

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JUDGE DAVID M. GLOVER

DIVISION I

CA06-712

December 6, 2006

ELAINE WILLIAMS & DAVID SMITH  
APPELLANTS

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES and MINOR  
CHILDREN

APPELLEES

APPEAL FROM THE JACKSON  
COUNTY CIRCUIT COURT

[JV-2004-58]

HONORABLE KEVIN N. KING,  
JUDGE

AFFIRMED

This appeal arises from an order terminating the parental rights of appellants, Elaine Williams and David Smith. Two sets of twins are involved, D.S. and T.S. (DOB 3-16-2004) and D.S. and C.S. (DOB 3-4-2005). The trial court terminated appellants' rights with respect to all four children. One appellate brief has been filed for the appellants, with Williams, the mother, contending that the trial court erred when it terminated her parental rights "on both the older and younger twins"; and Smith, the father, contending that the trial court erred when it denied him an appointed attorney at the probable-cause hearing. We affirm the order of termination.

*Background*

This case began with the removal of the only set of twins that appellants had at the time. The affidavit supporting the children's removal explained that a protective-services case had been opened on April 30, 2004, because the children were determined to be failing to thrive. On July 14, 2004, the children were taken into emergency custody because of continued problems with the health and safety of the home, which culminated in a report from DCFS supervisors that the house was very dirty with clothes and trash covering the floor, that the children slept on the floor in the mother's bedroom, that the staff at KIDS FIRST reported the children were so dirty that the staff would bathe them when they arrived, and that the children's diaper bag was "consumed with roaches." The children were approximately six months old at the time of removal.

On July 22, 2004, a probable-cause hearing was held, and the trial court determined that there was probable cause for the children to remain in ADHS custody. On August 24, 2004, the trial court made an agreed finding of dependency/neglect. A review hearing was held on November 23, 2004, and the children remained in foster care. It was at this review hearing that the trial court was informed that DNA testing showed appellant Smith was the father of the twins. On February 23, 2005, another review hearing was held, and appellant Williams reported that she was pregnant with another set of twins. She informed the court that they were due in April. ADHS reported that progress toward the parents standing on their own two feet was "painfully slow" and that there was no income between the two of them.

On June 29, 2005, a permanency-planning hearing was held, and the court announced that drug testing had revealed Williams was positive for cocaine. ADHS recommended that the children remain in foster care at least in part because “it appears the father is now in jail [“on child-support from yesterday”] and the mother had the positive cocaine result back.” ADHS also reported that the second set of twins had been born on March 4, 2005, and that they were three months old and still with the mother. The mother’s attorney stated, “We are agreeable to adding the younger two children into the current case.” Apparently, the two younger children were adjudicated dependent/neglected at that time based upon the mother’s positive cocaine test results. Williams’s attorney sought residential treatment for Williams’s drug problem, and she was ordered to attend in-patient drug treatment, which she entered on August 3, 2005. A review hearing was held on August 16, 2005. Williams was not present because she was at the in-patient drug treatment facility.

On September 20, 2005, a fifteen-month permanency-planning hearing was held, and ADHS sought permission to proceed toward termination of parental rights. Susan Simmons, a DCFS family service worker, testified that reunification was no longer an appropriate goal because the parents were not making steady progress toward reunification and Williams had been discharged from the drug-treatment facility without satisfactorily completing it. The facility reported that her discharge was based on her refusal to do the chores assigned to her, her involvement in more than one verbal altercation with other clients, and the fact that she completed none of her assignments for

treatment goals. Williams had entered treatment on August 2, 2005, and was discharged a little more than a month later in September 2005.

Cindy Rowlett, the DCFS supervisor in Jackson County, testified that Williams's positive test for cocaine on June 29, 2005, was the first indication they had of her drug use, but that Williams was tested a few days before she went to the treatment facility and she again tested positive. She reported that Williams was supposed to be getting employment somewhere and a stable home, but that she had not yet done so. She explained that a referral had been made for Williams to obtain mental-health supportive services but that she did not know if Williams had followed through with the referral. She stated that the children were first brought into care because of very poor hygiene, very poor living circumstances, and a concern about Williams's low functioning. In addition, the drug problem surfaced after the first set of twins had been removed and it led to the removal of the second set of twins.

Williams testified that she thought she had successfully completed the drug-treatment program; that she had not had any luck getting a job in the ten days since she been out of rehab; that she got \$574 from SSI every month just on herself; that if she got either set of twins back she would get additional SSI money; that she did not want to get a job because she did not want them to cut her SSI check off; that she was living in her own place with Smith's eighteen-year-old niece; that the niece would help her; that "I cannot do it by myself"; that the niece helps her with visitation with the children; that she does

not use drugs now; and that she did not know why she continued to use drugs from June 29, 2005, until she went into the treatment facility.

At the close of this review hearing the court decided that the goal should change to termination. The date of November 15, 2005, was set for a review and termination hearing, giving the parents sixty days within which to try to make improvements. On that date appellant Smith asked for an attorney and one was appointed. The appointed attorney asked for a continuance and it was granted.

*The Termination Hearing – December 13, 2005*

On December 13, 2005, both appellants appeared at the termination hearing with counsel. Ainslee Brown, an adoption specialist for ADHS, testified that the four children would be adoptable, although they might not be able to remain together.

Susan Simmons, the caseworker for the Smith children since the first week in August 2005, testified that she was familiar with the history of the case. She explained that the older set of twins entered care on July 14, 2004, because of environmental neglect and had remained in foster care since that time. She stated that the younger set of twins entered foster care when the mother failed a drug test for cocaine. Simmons explained that they had worked with Williams on drug treatment but that she had left before she was finished with the program, and that although she had started outpatient mental-health counseling before she went to the drug-treatment facility, she had not gone back. She stated that the two primary barriers to recommending a return of the children was concern over possible drug use and concern about the parents' ability to effectively and safely

parent and handle all of the children in the home. She said that they seemed overwhelmed by the children's needs. She also stated that they had never taken any initiative on their own.

Appellant Williams testified that Smith's niece stays with her; that Smith was the father of all of her children; that she did not complete the inpatient drug-treatment program; that she was currently going to outpatient at NADC, but that when she went on Thursday "no one was there"; that she "could not remember the last time she went before last Thursday"; and that she was still not going to regular counseling "because she has been trying to find one to go to." She stated that Smith stayed at her house sometimes, but that he lived with his mother. She acknowledged that he had told the caseworker he would test positive for cocaine; that she has seen him use cocaine; that she has never paid any child support for the children; that she does not currently have a job because "I get \$574 every month disability"; that she does not have any other income; and that the last time she used cocaine was five months ago, August 2005, before going in for treatment. She denied being overwhelmed by all four children, and stated that her house was now clean, that she had completed parenting classes, that she had visited with her children like she was supposed to do, and that she could handle all four of them.

Appellant David Smith testified that he had been "established to be the legal father of the children." He said that if the court were to order a drug test on him that day, he would test positive for cocaine. He stated that he had been ordered to pay child support, but that he did not have a job and therefore had not paid support. He said that he had

been found in contempt for his arrearages in child support; and that the court had ordered him to remain drug-free but that he had not done so. He acknowledged that he did not have a home of his own where he could take care of the children; that he did not have a job to provide for their needs; and that he knew where ADHS was located but had never sought services.

At the conclusion of the hearing, the parties moved for a directed verdict. The trial court denied the motion, explaining that it found by clear and convincing evidence that ADHS proved that the termination was in the best interests of all four children and that at least one of the grounds for termination had been proven. The court found that the two older children had been adjudicated dependent/neglected and been out of the home for more than twelve months and that despite all reasonable efforts to rehabilitate, the conditions that caused removal had not been remedied. In addition, the court found that subsequent to the dependency/neglect petition, other factors and issues had arisen with respect to all four children that demonstrated that return was contrary to their health, safety and welfare, and that despite the offer of appropriate family services the parents had manifested the incapacity or indifference to remedy the subsequent issues or factors. The court also found that the children had been subject to aggravated circumstances in the form of the continued drug use by Smith.

The court explained its position by noting that the mother had left court-ordered treatment; that she seemed incapable of discerning how some of her decisions affected her and her children; that the case plan had not been followed; that the court did not

believe either parent was in a position to deal with the children without additional help; that testimony indicated Williams would have difficulty properly recognizing stages of childhood development to be able to provide the appropriate care; that during visitation, the parents were overwhelmed; that reunification was not possible within a reasonable period of time; that permanency was a primary concern along with best interest of the children, who had been in foster care most of their lives; that any permanency with the parents was difficult, if not impossible, at that time; that the environmental-neglect issue had been remedied, but that it was done so with the assistance of Smith's niece and that without her it appeared that Williams would be unable to keep her apartment in appropriate condition; and that the parties did not have sufficient income to pay support and neither had done so.

*Williams's Argument*

For her sole point of appeal, the mother contends that the facts that were developed at the termination hearing do not support the judge's granting of the petition to terminate. We disagree. In *Kight v. Arkansas Department of Human Services*, 94 Ark. App. 400, 404-05, \_\_\_\_ S.W.3d \_\_\_\_, \_\_\_\_ (2006), this court explained:

The standard of review in termination-of-parental rights cases is well-settled. In *Johnson v. Arkansas Department of Human Services*, 78 Ark. App. 112, 119, 82 S.W.3d 183, 187 (2002), the court held:

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party to terminate the relationship. Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the

child. The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. In resolving the clearly erroneous questions, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations.

An order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the child, taking into consideration the likelihood that the child will be adopted and the potential harm caused by continuing contact with the parent. In addition to determining the best interests of the child, the court must find clear and convincing evidence that the circumstances exist that, according to the statute, justify terminating parental rights.

*Arkansas Code Annotated section 9-27-341*

Arkansas Code Annotated section 9-27-341 provides in part:

(a)(3) The intent of this section is to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective.

....

(b)(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

(b) It is not necessary that the twelve-month period referenced in subdivision (b)(3)(B)(i)(a) of this section immediately precede the filing of the petition for termination of parental rights or that it be for twelve (12) consecutive months;

(ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.

(b) To find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home.

(c) Material support consists of either financial contributions or food, shelter, clothing, or other necessities when the contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction.

....

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

....

(c) For purposes of this subdivision (b)(3)(B)(vii), the inability or incapacity to remedy or rehabilitate includes, but is not limited to, mental illness, emotional illness, or mental deficiencies;

....

(d)(1) The court shall conduct and complete a termination of parental rights hearing within ninety (90) days from the date the petition for termination of parental rights is filed unless continued for good cause as articulated in the written order of the court.

(2) If the parent was represented by counsel, the court shall take judicial notice and incorporate by reference into the record all pleadings and testimony in the case incurred before the termination of parental rights hearing.

Here, the adoption specialist testified that the children were adoptable and that while there could be no guarantees of keeping them all together, ADHS would try to do so. In addition, although the trial court acknowledged that the environmental neglect that prompted the removal of the first set of twins had been corrected, he specifically noted the fact that without the help of Smith's niece, appellant herself had acknowledged that she would not be able to do it alone. Consequently, a return of the children to the parent's custody would be potentially harmful. These factors apply equally to both sets of twins and establish the first portion of the requirement that termination was in the children's best interest.

There was also clear and convincing evidence to support one or more of the other statutory grounds listed under section 9-27-341(b)(3)(B) with respect to each set of twins. Subsection (B)(i) provides an additional statutory ground for the termination with respect to the first set of twins. It was established by clear and convincing proof that they had

been adjudicated dependent-neglected and continued out of the parents' custody for twelve months, and despite a meaningful effort by the department to rehabilitate the parents and correct the conditions that caused removal, those conditions had not been remedied by the parent. While the house was clean, the court made it clear that it was only because of the niece's efforts and that Williams would not be able to correct the situation on her own; that she still was not in a position to deal with the children on her own; that there were currently two more children than when the first set of twins was taken; that Williams had difficulty recognizing childhood-development problems and providing appropriate care; and that she was overwhelmed during visits with the children.

In addition, other factors or issues arose subsequent to the filing of the original petition for dependency/neglect that demonstrated that return of the juveniles to Williams's custody was contrary to the juveniles' health, safety, or welfare and that, despite the offer of appropriate family services, Williams had manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate her circumstances, preventing return of the juveniles to her custody. After the original petition for dependency/neglect had been filed with respect to the first set of twins, the second set of twins was born and Williams tested positive for cocaine on more than one occasion. She did not successfully complete the court-ordered inpatient drug-treatment program. Moreover, as noted earlier, the court found that the case plan had not been followed; that Williams could not deal with the children without additional help; that she

had difficulty providing the appropriate care and determining what was required of her as a parent; and that she was overwhelmed during visitation.

In summary, we find no clear error in the trial court's finding that the facts warranting termination of Williams's parental rights were proven by clear and convincing evidence.

#### *Smith's Argument*

For his sole point of appeal, appellant Smith contends that the "trial court erred when it denied [him] an appointed attorney at the probable cause hearing." We do not reach the issue because it was not preserved for our review.

Counsel was appointed for Smith before the termination hearing and was given a continuance in order to prepare for the hearing. No argument was ever raised before the trial court concerning any asserted error in not appointing counsel for Smith at the probable cause hearing. We do not address issues that are raised for the first time on appeal. *Maxwell v. Arkansas Dep't of Human Servs.*, 90 Ark. App. 223, \_\_\_\_ S.W.3d \_\_\_\_ (2005).

Affirmed.

VAUGHT and CRABTREE, JJ., agree.